In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 947

GULF-CANAL LINES, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

Common carriers on inland waterways engaged in towing and affreightment are subject to regulation by the Interstate Commerce Commission under Part III of the Interstate Commerce Act (54 Stat. 929–952, as amended, 49 U.S.C. 901–923). Unless expressly exempted, they are required to possess certificates of convenience and necessity for the routes on which they operate; maintain reasonable rates, charges and prac-

tices; publish and adhere to tariffs; file reports and comply with other regulatory requirements. Under Section 303(b) of the Act, 49 U.S.C. 903(b) [1] transportation of not more than three bulk commodities in a single vessel or vessels being navigated as a unit (a flotilla) is exempted from regulation and may be performed without regard to certificated route authority or published tariff rates. This case involves the scope of that exemption as applied to tows which mix bulk and non-bulk cargoes.

Many certificated carriers have non-certificated affiliates, which handle exempt contracts of affreightment for bulk commodities. After entering into such a contract with a shipper, a non-certificated barge line may engage the certificated carrier to tow the shipment from an intermediate point to its ultimate destination, where the non-certificated carrier then takes possession again and delivers the barge to the consignee. The question involved here arises when, in performing its contract of towage, the certificated carrier combines bulk with non-bulk commodities in a single tow.

[1] "Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count. For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. This subsection shall not apply to transportation subject, at the time this part takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended."

On August 31, 1959, a number of certificated carriers petitioned the Commission for a declaratory ruling as to the application of Section 303(b)[1] in this situation.[2] The Commission held that the mixing of bulk and non-bulk commodities by the certificated carrier subjected the entire transportation—including that of the non-certificated carrier—to the regulatory requirements of the Act. It stated (J.S. App. 28):

> The device of contracting with shippers to transport bulk commodities at rates different from those published and on file with the Commission, and then employing the towing services of others as posed in the questions, would permit the transportation of bulk commodities free of regulation irrespective of the conditions of the exemption; and carriers not holding certificates or permits would be able to circumvent the certificate, permit, and tariff provisions of the act and enter the transportation field, or extend their operations merely by utilizing the towing services of authorized carriers. Clearly if the bulk-commodity exemption is to be applicable, the limitations thereof must be observed for the entire continuous movement.

In a proceeding to review this decision filed by appellants—who are certificated carriers[3] and their respective non-certificated affiliates[4]—a three-judge

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[2] The petitioners presented questions based on two hypothetical fact situations exemplifying typical arrangements between certificated and non-certificated carriers (J.S. App. 30–32). Cf. *Frozen Food Express* v. *United States*, 351 U.S. 40.

[3] Mississippi Valley Barge Line Company; Federal Barge Lines, Inc.; American Commercial Barge Line Company.

[4] Valley Line Supply and Equipment Company; Gulf-Canal Lines, Inc.; Commercial Transport Corporation.

court unanimously sustained the Commission's ruling (J.S. App. 1-17; 258 F. Supp. 864).

ARGUMENT

This appeal presents no question warranting plenary review

1. The Commission's ruling that the bulk-commodities exemption is inapplicable where bulk and non-bulk commodities are transported in the same flotilla was recently sustained by this Court. *Commercial Barge Lines* v. *United States*, 166 F. Supp. 867 (E.D. Mich.), affirmed *per curiam*, 359 U.S. 342. The Commission has consistently followed this interpretation since it first considered Section 303(b) in 1941.[5] And, although water carrier interests have asked Congress to change the "no-mixing" rule,[6] Congress has never

[5] See Administrative Ruling No. 6, CCH Fed. Carr. Reporter ¶ 25,406. See also, *e.g.*, *Commercial Transp. Corp. Exemp.*, *Sec. 303(b) and 303(f)(2)*, 300 I.C.C. 66, sustained *sub nom.*, *Commercial Barge Lines* v. *United States*, 166 F. Supp. 867 (E.D. Mich.), affirmed *per curiam*, 359 U.S. 342; *Water Carrier Service on Great Lakes, Nonowned Vessels*, 285 I.C.C. 52, 59-60; *Portland Tug & Barge Co. Extension*, 265 I.C.C. 325, 335; *American Barge Line Co. Applications*, 265 I.C.C. 231, 233, 235; *Inland Navigation Co. Applications*, 250 I.C.C. 703, 707; *Ralph Raike Applications*, 250 I.C.C. 177.

The Commission's construction is analogous to its construction of the agricultural-commodities exemption under Part II of the Act as applying only if the vehicle is not used at the same time for the transportation of other commodities. See, *e.g.*, *Interstate Commerce Commission* v. *Service Trucking Co.*, 186 F. 2d 400 (C.A. 3); *Willis Shaw Frozen Exp., Inc., Contr. Carr.*, 89 M.C.C. 377, sustained, *Willis Shaw Frozen Exp., Inc.* v. *United States* (C.A. No. 1655, W.D. Ark., February 11, 1963), reversed on other grounds, 337 U.S. 159; *Panther Oil and Grease Mfg. Co., Inc., Contr. Car. Application*, 84 M.C.C. 393.

[6] The proposed legislation, in part, would have inserted the following sentence in Section 303(b): "The transportation, sub-

seen fit to overrule the Commission's longstanding interpretation of Section 303(b). In view of the weight to which such contemporaneous and consistent construction is entitled (*Maintenance Employes v. United States*, 366 U.S. 169, 179; *United States v. Leslie Salt Co.*, 350 U.S. 383, 396), this congressional inaction may be viewed "as a *de facto* acquiescence in and ratification of the Commission's * * * procedure" (*Power Reactor Co. v. Electricians*, 367 U.S. 396, 409). As the court below observed, "At this late date no serious question is raised by [appellants'] first argument" (J.S. App. 6).

2. Appellants' second contention—that, assuming the validity of the "no-mixing" rule, the only transportation which should be deemed outside the Section 303(b) exemption is that performed by the carrier actually towing the mixed load—was properly rejected by the Commission and the court below. Had the non-certificated carrier (which contracted with the shipper to deliver bulk commodities) performed its contract entirely by itself, the "no mix" rule plainly would have rendered the transportation non-exempt if, at some point, non-bulk commodities were included in the load. See *Water Carrier Service on Great Lakes, Nonowned Vessels*, 285 I.C.C. 52, 59-60;

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ject to the provisions of this part, of commodities not in bulk, or commodities in bulk at rates lawfully filed, or both, shall not prevent the application of the provisions of this subsection to the concurrent transportation in the same vessel of commodities in bulk moving under the exemption provided in this subsection." Hearings on H.R. 9046 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 87th Cong., 2d Sess., p. 6 (1961). See also S. Rep. No. 838, 87th Cong., 1st Sess.

American Barge Line Co. Applications, 265 I.C.C. 231, 235. That the original carrier performed a portion of its contract of affreightment through an intermediary should not change the result. As the court below correctly noted, "the transportation of the bulk commodities, even while in [the second carrier's] tow, is transportation [within the meaning of the Act] for which [the original carrier] contracted and for which it is responsible" (Pet. App. 14 & n. 15). To exempt a carrier which undertakes a contract of affreightment when the transportation pursuant to that contract—albeit through an intermediary—is outside the limits of Section 303(b) would, as the Commission held (*supra*, p. 3), permit circumvention of the Act's regulatory requirements through manipulation of the bulk-commodity exemption.

The Act regulates the business of affreightment, and it is the responsibility of the carrier who undertakes such business to see that it is performed in accordance with the statutory provisions. Contrary to appellants' apparent suggestion (J.S. 14–16), the fact that the barge line on whose flotilla the mixing physically occurs may be a certificated common carrier, observing the applicable regulatory requirements, does not bar a determination that the noncertificated carrier which undertook the transportation of bulk commodities is also outside the scope of Section 303(b)'s exemption.[7] The court below prop-

[7] In a slightly different context, the courts have made it clear that the status of the underlying carrier is not determinative of the status of the person assuming the transportation obligation. *National Motor Freight Traffic Ass'n* v. *United States*, 242 F. Supp. 601 (D.D.C.); *Freight Consolidators Cooperative* v. *United*

erly concluded that, to retain its exemption, the non-certificated carrier "may not mix; nor may he use otherwise available facilities which result in mixing. The sanction is not * * * on the tower. Rather it is directly on the one claiming exemption" (J.S. App. 16).[8]

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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States, 230 F. Supp. 692 (S.D.N.Y.); *Consolidated Freightways v. United States*, 176 F. Supp. 559 (N.D. Cal.); *ABC Freight Forwarding Corp. v. United States*, 125 F. Supp. 26 (S.D.N.Y.), affirmed *per curiam*, 348 U.S. 967.

[8] Appellants' final contention (J.S. 17-19)—that the Commission's rule limits the towage certificates held by the certificated appellants—is patently insubstantial. An implicit condition of appellants' certificates is that they operate within the requirements of the Act.